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No. 87-1646

Supreme Court, U.S.  
FILED

JUN 25 1988

JOSEPH F. SPANIOLO, JR.  
CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1987

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**SEQUOIA BOOKS, INC.,**

*Petitioner,*

v.

**PEOPLE OF THE STATE OF ILLINOIS,**

*Respondent.*

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**On Petition For A Writ Of Certiorari To The  
Appellate Court Of Illinois, Second District**

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**RESPONDENT'S BRIEF IN OPPOSITION**

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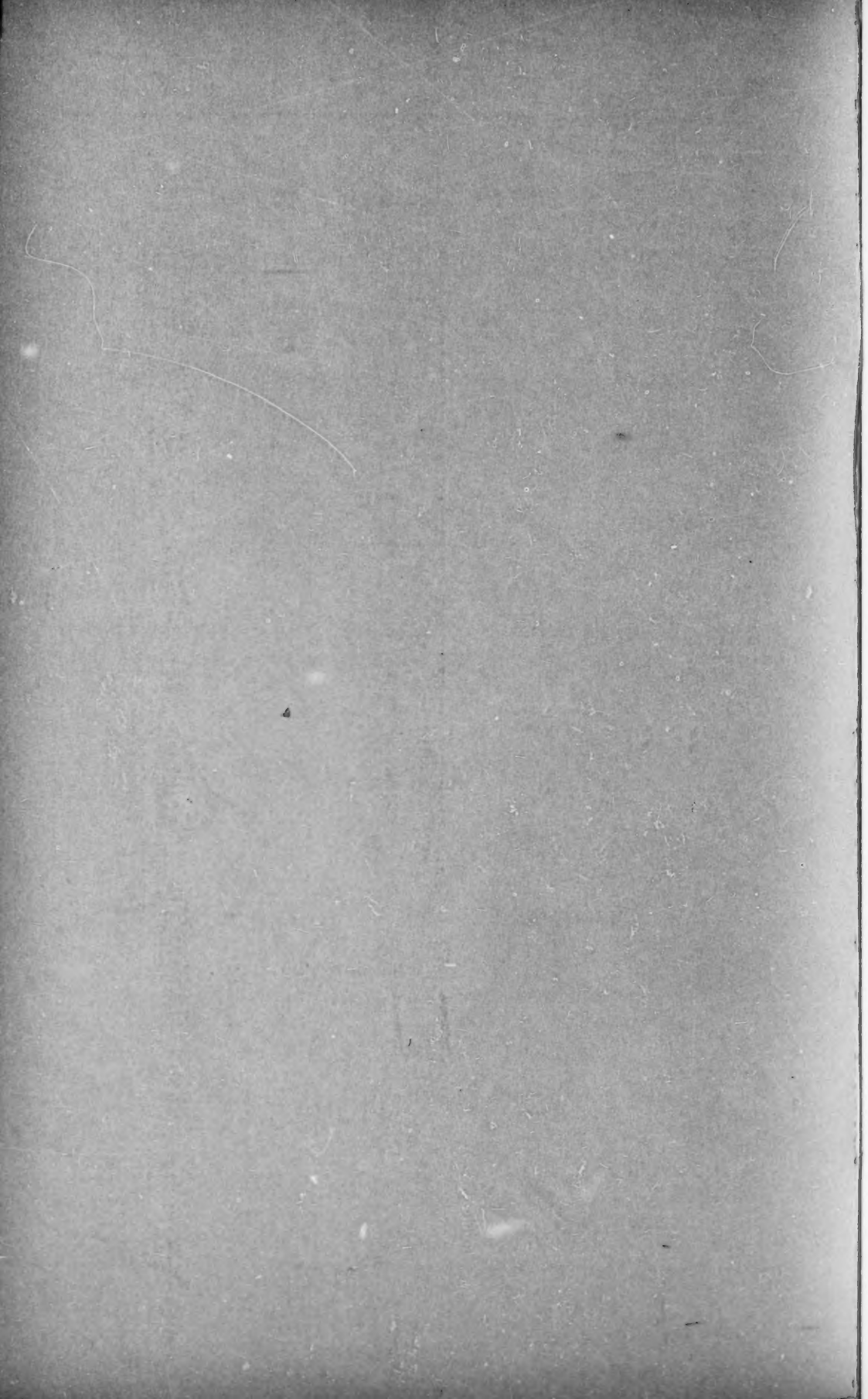
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## QUESTIONS PRESENTED

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1. Did the search warrant procedure comply with constitutional authority? Is there any conflict between the Illinois Appellate Court opinion and decisions from the Courts of Appeals?

2. Did the procedure which provided special interrogatories to assure that single general verdict was based upon specific consideration of all the magazines comply with constitutional authority? Did this procedure affect the independent function of the jury? Did it actually benefit petitioner?

3. Did the denial of evidence tendered by the defense and refused as irrelevant comply with constitutional law? Is there any conflict between the Illinois Appellate Court opinion and decisions from other courts?

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**RESPONDENT'S BRIEF IN OPPOSITION**

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**PRAYER**

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Respondent asks this Court to deny the petition for writ of certiorari to review the judgment and order of the Appellate Court of Illinois, Second District, insofar as the petitioner does not raise any issues worthy of review by the Court.

## OPINION BELOW

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The opinion below is cited as *People v. Sequoia Books*, 160 Ill.App.3d 315, 513 N.E.2d 468 (1987). A copy of the opinion is included in petitioner's appendix.

## STATEMENT OF THE CASE

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Petitioner Sequoia Books, Inc., was charged by complaint with obscenity in two separate cases in Kendall County, Illinois. Sequoia Books was found guilty by separate juries in each case and sentenced to a \$1,000 fine, plus costs, in one case and a \$924 fine, plus costs, in the other.

### A) The Search Warrants

Charges in these cases arose after a Kendall County judge issued a search warrant on August 9, 1985, for the Denmark Bookstore in Aurora, Illinois, which is owned and operated by Sequoia Books. The warrant authorized a search for evidence of the offense of obscenity and seizure of magazines that contained depictions of certain sexual conduct.

The warrant was supported by the affidavits of two investigators with the State's Attorney's office. One investigator stated that he had observed hundreds of magazines depicting acts described in the warrant. The other stated that numerous charges had been filed against the various persons resulting from the purchase of magazines and

movies from the Denmark Bookstore. Officials went to the Denmark Bookstore and, pursuant to the warrant, seized 48 different magazines.

Another search warrant was issued February 19, 1986. This one also authorized the seizure of magazines containing depictions of sexual activity and bondage. It was supported by the affidavit of an investigator with the State's Attorney's office who stated that he had recently purchased eight magazines from the store. These magazines were tendered to the judge for review upon issuance of the warrant. Pursuant to this warrant, officials went to the bookstore and seized 177 magazines.

#### **B) The Charges and Pretrial Motions**

Sequoia Books was charged in two separate cases with one count of obscenity. Each complaint charged that Sequoia Books had offered obscene magazines for sale and incorporated by reference the list of magazines that had been seized. Sequoia Books pleaded not guilty in each case.

In each case, Sequoia Books filed motions to quash the search warrant, to suppress the evidence, and to return the items seized on the basis that the search and seizures violated its First, Fourth, and Fourteenth Amendment rights. Following an evidentiary hearing, motions in both cases were denied.

Sequoia Books also filed motions to dismiss in each case on several bases. One was that the complaints were improperly drawn insofar as a large number of magazines had been included within a single count. The other was that the Illinois obscenity statute was unconstitutional in both its pre-1986 form and its post-1986 form. After a hearing in both cases, the motions to dismiss were denied.

## **Trials**

The same judge presided over both trials. In both trials, the State's case consisted of 1) a stipulation by the parties that Sequoia Books owned and operated the bookstores, that it offered the charged magazines for sale on the dates in question, and that it knew the nature and contents of the magazines; 2) testimony that the magazines lacked value, had a negative and dehumanizing effect on the average adult, and that each of the magazines appealed to the prurient interest of the average adult; and 3) the magazines themselves. Additionally, in the second case, the State presented testimony that the magazines had no serious value in the fields of literature or art.

The defense in both trials was that the magazines were not obscene under contemporary community standards. Its case consisted of 1) a public opinion poll conducted in 1983 that was designed to establish the attitudes that adults living across the State of Illinois have towards sexually explicit material; 2) testimony as to the various bookstores in communities throughout Illinois and the types of magazines they offered for sale; 3) testimony that the magazines did not appeal to prurient interest but, rather, appealed to the normal curiosity of the average adult about sex; and 4) testimony that the magazines would not lead the average adult to commit antisocial acts and that the magazines had value in that they provided a release and entertainment for a segment of the population.

In both cases, the court refused to allow the defense to introduce certified copies of adult-use ordinances from several municipalities throughout Illinois which it had offered as evidence of community standards.

At the jury instruction conferences, there was a debate over whether the jury had to find all the magazines obscene or just one. The State offered instructions which

permitted the jury to find Sequoia Books guilty if it found a single magazine to be obscene. Sequoia Books tendered alternative instructions which would require the jury to find all of the magazines obscene in order to find it guilty.

In both cases, the court accepted the State's theory that the State could proceed on a single count for as many magazines as it chose and obtain a conviction regardless of a finding by the jury that some of the magazines were not obscene and thus constitutionally protected. In both cases, general verdicts were given to the jury, as well as a special interrogatory, over defense objections, requiring it to answer "yes" or "no" as to the obscenity of each magazine on trial. Also over defense objection, the court gave the State's instruction which allowed the jury to rely on their "collective observations" in applying Illinois contemporary standards. The court refused the instruction, tendered by the defense, which would have informed the jury that the issue of obscenity should be decided in the context of dissemination of the magazine.

The jury returned a general verdict of guilty in each case. In the first case, the special interrogatories found 8 magazines obscene but left 40 blanks. After the court accepted the general verdict and instructed the jury to continue deliberation, the jury returned with a finding that all 40 magazines were not obscene. In the second case, the special interrogatories were fully completed, finding 170 magazines obscene and 7 not obscene.

### Direct Appeal

Sequoia Books raised eight issues, many of which were rejected on the basis of opinions the court had rendered in previous actions involving the same defendant: *People v. Sequoia Books*, 145 Ill.App.3d 1054 (1986) and *People v. Sequoia Books*, 146 Ill.App.3d 1 (1986).

The first three issues, also raised now, attacked the search warrant: that the warrant applications failed to demonstrate probable cause, that the search was overly broad, and that the warrant process was a plan to economically harm the operation of the bookstore. The appellate court had rejected similar contentions involving similar warrants in earlier cases and declined to reconsider its previous decisions.

The fourth attack on the constitutionality of the obscenity act, which is not raised before this Court, was rejected. The court declined to find the pre-1986 act unconstitutional, relying on this Court's opinion in *Pope v. Illinois*, 481 U.S. \_\_\_, 107 S.Ct. 1918, 95 L.Ed.2d 439 (1987). It also rejected that the term "prurient interest" in the post-1986 act was insufficiently defined. This issue is not raised in the petition to this Court.

The court rejected the fifth claim, which is also presented to this Court, that evidence of the adult-use ordinances was improperly refused, on the basis of a previous Sequoia Books opinion and where it was not relevant since such ordinances also regulate non-obscene materials.

The next two issues involved jury instructions and are not presented now. The court rejected the attack on a certain jury instruction on the basis of a previous Sequoia Books opinion and on this Court's opinion in *Pope v. Illinois* and also because, on the record, any possible error could only be harmless. It rejected the claim that the court improperly refused the defense's non-IPI instruction on the basis of prior opinions.

Last, the court found no error in the procedure whereby the jury received a general verdict form along with special interrogatories as to the obscenity of each magazine. This issue is re-raised in the petition to this Court.

## REASONS FOR DENYING THE WRIT

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### I.

THERE IS NO REASON WHY THIS COURT SHOULD REVIEW THE SEARCH WARRANT PROCEDURE SINCE IT COMPLIED WITH CONSTITUTIONAL AUTHORITY; PETITIONER HAS FAILED TO SHOW THAT CONSTITUTIONAL ERROR OCCURRED OR THAT THE STATE'S DECISION CONFLICTS WITH DECISIONS FROM THE COURTS OF APPEALS.

Sequoia Books alleges two reasons why this Court should review the search warrant procedure in this case: 1) this Court must correct constitutional error that occurred within that procedure and 2) it must resolve a conflict in the law regarding search warrants in first amendment cases. However, neither is a reason for granting review.

First, constitutional error did not occur in this case. The search warrant procedure was consistent with the special first amendment requirements outlined by this Court in *New York v. P.J. Video*, 475 U.S. 868 (1986). *P.J. Video* requires that, before authorizing the seizure of materials presumptively protected by the first amendment, the magistrate must make sure that the warrant application is supported by affidavits setting forth specific facts. This requirement enables the judge to focus searchingly on the question of obscenity. Furthermore, the police may not dispense with the warrant requirement, as they ordinarily could in exigent situations, whenever this would constitute a prior restraint. Rather, large-scale seizures must be preceded by an adversarial hearing on the obscenity question before the search can take place. But it is a defendant's burden to make the pretrial showing of a "substan-

tial" prior restraint before such an adversarial hearing need take place.

But aside from these, warrant applications for seizures of allegedly obscene magazines are the same as those applied generally. The magistrate must apply a uniform standard of probable cause: a probability or substantial chance of criminal activity, not an actual showing.

The principles of *P.J. Video* were followed by the issuing magistrate in the cases at bar. Despite petitioner's contrary claim, the judge who issued the August, 1985, warrant after an adversarial hearing did searchingly focus on the obscenity of the magazines to be seized by making sure that the warrant application was supported by affidavits setting forth specific facts. The warrant application was supported by two affidavits, each from an investigator with the State's Attorney's office. One investigator stated that he had been to the bookstore and purchased three magazines entitled *Cum Shootout*, *Chain Gang Bang*, and *Tightropes*, each of which depicted more than one sexual act listed on the application. The application listed the following acts: cunnilingus, fellatio, anal intercourse, excretion of semen from a penis onto other persons, masturbation, vaginal or anal insertion of prosthetic devices, and insertion of a tongue into an anus. The investigator also observed over a hundred magazines, many of which, if not all, depicted the same acts. All of these magazines were offered for sale to the public. The second affidavit stated that numerous charges had been filed against the various persons resulting from the purchase of magazines and movies from the Denmark Bookstore.

These affidavits gave the judge the opportunity to determine that there was a probability of criminal activity occurring in the bookstore, namely the sale of magazines

not protected by the first amendment. The judge therefore issued a warrant authorizing officials to seize such magazines. The issuing judge was not constitutionally required to first examine the materials which were to be seized. The affidavits were sufficient since, in *P.J. Video*, the warrant issued on the basis of affidavits detailing the character of certain films and the issuing magistrate did not view the films himself. See also *Sequoia Books v. McDonald*, 725 F.2d 1091 (7th Cir. 1984), cert. denied, 105 S.Ct. 83 (magistrate properly issued warrant based on affidavits and without himself viewing magazines).

Since the warrant contained the same language as the warrant application in defining the nature of the sexual depictions, petitioner's contention that the warrant was a general one which left total discretion to the executing officers as to what items and what quantity was to be seized is refuted. The officers were limited in their seizure to magazines containing the depictions listed on the warrant.

Nor did the issuance of the warrant constitute a prior restraint. A prior restraint occurs only when the police rely on exigent circumstances to dispense with the warrant requirement and make a large-scale seizure. There is no prior restraint, even where there is a large-scale seizure, so long as the police first obtain a warrant after an adversarial hearing on the obscenity question. Moreover, it is defendant's own burden to prove the prior restraint before the holding of the adversarial hearing. Thus there was no prior restraint in this case since the State secured a warrant after an adversarial proceeding and since *Sequoia Books* never proved the existence of a substantial prior restraint before the seizure took place.

Furthermore, because of this failure, there is no evidence that *Sequoia Books* was in any way economically

harmful, that the police seized any more than a single copy of each magazine, or that the store was closed down. Rather, it appears from the record that some magazines were seized for evidentiary purposes and the store continued to operate throughout the entire prosecution.

The same is true for the February, 1986 warrant. The warrant application was supported by an affidavit from an investigator with the State's Attorney's office. It stated that he had been to the bookstore on two separate recent evenings and purchased eight magazines. All eight magazines were tendered to the judge for his perusal. The affidavits and magazines enabled the judge to determine that criminal activity was probably occurring in the bookstore. The judge therefore issued a warrant authorizing the seizure of such magazines.

This warrant contained language identical to that in the August, 1985 warrant insofar as it defined the sexual depictions that must be contained in a magazine before it is seized. It additionally included depictions of male or female persons with genitals or breasts being fettered or bound or otherwise physically restrained and the insertion of objects into a penis or anus. Thus again, the executing officers did not have total discretion as to what items and what quantity they could seize. They were limited in their seizure to magazines containing the depictions listed on the warrant. Finally, this second warrant did not constitute a prior restraint for the same reasons as the first warrant.

Similar warrant procedure was upheld in *People v. Sequoia Books*, 145 Ill.App.3d 1054, 495 N.E.2d 1292 (2nd Dist. 1986), *People v. Sequoia Books*, 146 Ill.App.3d 1, 496 N.E.2d 740 (2nd Dist. 1986), and *People v. Sequoia Books*, 150 Ill.App.3d 211, 501 N.E.2d 856 (2nd Dist. 1986). There-

fore, Sequoia Books has failed to show the existence of a constitutional error that needs correction by this Court.

Sequoia Books also claims that the Illinois Appellate Court refusal to condemn these warrants as general warrants cannot be squared with two cases from the Courts of Appeals, *United States v. Guarino*, 729 F.2d 864 (1st Cir. 1984) and *United States v. Tupler*, 564 F.2d 1294 (9th Cir. 1977). But, in fact, there is no conflict between these cases and the Illinois appellate court opinion. These opinions agree that 1) a search warrant must define what is to be seized with specificity so that the executing officer may not exercise judgment when making seizures and that 2) probable cause for a warrant requires that the materials first be viewed.

In *Guarino*, specificity was lacking because the warrant authorized nothing more specific than the seizure of "obscene materials," leaving it to the officer's opinion to decide what is obscene. *Guarino*, 729 F.2d at 865, 867. But specificity was not lacking in this case. The August, 1985 warrant authorized the officers to seize only those magazines depicting factually identifiable acts such as cunnilingus, fellatio, anal intercourse, excretion of semen from a penis onto other persons, masturbation, vaginal or anal insertion of prosthetic devices, and insertion of a tongue into an anus. The February, 1986 warrant contained that identical list, as well as depictions of male or female persons with genitals or breasts being fettered or bound or otherwise physically restrained and the insertion of objects into a penis or anus. The warrants at bar contained the specificity found lacking in *Guarino*.

In *Tupler*, probable cause was lacking because the State did not view the alleged obscene films nor tender them to the issuing judge for review, but assumed they were

obscene from film packaging. *Tupler*, 564 F.2d at 1297. But probable cause was not lacking in this case. With regard to the August, 1985 warrant, an investigator for the State personally viewed over one hundred magazines in the bookstore and saw that each depicted such acts as cunnilingus, fellatio, anal intercourse, excretion of semen from a penis onto other persons, masturbation, vaginal or anal insertion of prosthetic devices, and insertion of a tongue into an anus. All were offered for sale and he purchased three magazines entitled Cum Shootout, Chain Gang Bang, and Tightropes. As to the February, 1986 warrant, a State investigator personally viewed the magazines at the bookstore containing the same depictions listed above and then purchased eight magazines that he tendered to the judge. The warrants at bar were based on the probable cause that was lacking in *Tupler*.

Therefore, there is no conflict between the Illinois opinion and *Guarino* and *Tupler*.

## II.

**THE PROCEDURE ALLOWING A SINGLE CONVICTION AND GENERAL VERDICT BASED ON NUMEROUS MAGAZINES ASSURED SPECIFIC CONSIDERATION OF ALL THE MAGAZINES BY USE OF SPECIAL INTERROGATORIES; THE SPECIAL INTERROGATORIES DID NOT IMPAIR THE JURY'S INDEPENDENT FUNCTION AND ACTUALLY BENEFITED PETITIONER.**

Sequoia Books asks this Court to review the procedure of seeking a single conviction based on numerous magazines because it resulted in constitutional error. He claims that the single count method constituted a prior restraint by denying the jury the opportunity to specifically consider each magazine and creating the probability that no 12 jurors unanimously agreed upon the obscenity of any

one magazine. The use of special interrogatories to assure specific consideration did not prevent the error but actually expanded the strict elements of the offense and potentially infringed on the jury's freedom.

However, constitutional error did not occur here. In the first trial, the State sought a single conviction for obscenity based on any of 48 individual magazines. In the second trial, it sought a single conviction for obscenity based on any of 177 individual magazines. To assure, in each case, that all twelve jurors gave specific consideration all the material, the jurors were required to answer special interrogatories as to the obscenity of each magazine.

This Court noted in *Street v. New York*, 394 U.S. 576, 89 S.Ct. 1354, 1362 (1969), that in some circumstances a general verdict can present a problem. Thus, in *Street*, the validity of a general verdict for flag desecration was questionable where there was no way to know from the record whether it was based on the permissible ground of burning the flag or the impermissible ground of speaking contemptuously about the flag or an impermissible combination of both. But that problem was eliminated at bar by the giving of special interrogatories. These demonstrated that, in the first case, the jury determined that 8 of 48 magazines were obscene and supported its single verdict. In the second case, 170 of 177 magazines were obscene and supported its verdict. This procedure assured that whole jury specifically considered each magazine and reached unanimous agreement before finding any magazine to be obscene.

The procedure created several additional advantages here, as well. It reduced the vast number of instruction and verdict forms that would have otherwise been necessary, it assured that the non-obscene books were returned

to the petitioner, and it lessened the collective impact of the material. Moreover, it exposed petitioner to only two obscenity convictions, rather than a possible 225 convictions.

While it is true that special interrogatories are not generally given in criminal trials, the Constitution does not forbid them. See *Heald v. Mullaney*, 505 F.2d 1241 (1st Cir. 1974). They are suspect only insofar as they may jeopardize the independence of the jury by coloring its decision-making process with a step-by-step series of questions inexorably leading the jury to conclude that defendant is guilty. *Heald*, 505 F.2d at 1246; *United States v. Spock*, 416 F.2d 165, 182 (1st Cir. 1969). Where they do not impair the jury's independent function and actually benefit a defendant, their use will survive a constitutional challenge. *Heald*, 505 F.2d at 1246.

Here, the special interrogatories imposed no special burden on the jury. The jury was duty bound to examine each magazine and the special interrogatories assured that it did. Had the jury been instructed in the manner requested by petitioner, its function would have been identical: to examine each magazine and determine whether it was obscene or not. Moreover, as already explained, Sequoia Books actually benefited in several material ways from this procedure. The procedure here survives constitutional challenge. No constitutional error occurred.

III.

**THERE IS NO REASON WHY THIS COURT SHOULD REVIEW THE INADMISSIBILITY OF EVIDENCE TENDERED BY THE DEFENSE SINCE IT WAS PROPERLY DEEMED IRRELEVANT; PETITIONER HAS FAILED TO SHOW THAT CONSTITUTIONAL ERROR OCCURRED OR THAT THE STATE'S DECISION CONFLICTS WITH OTHER JUDICIAL DECISIONS.**

Sequoia Books asks this Court to review a question of admissibility of evidence for two reasons: 1) it must correct constitutional error that occurred when the trial court would not allow the defense to present adult-use ordinances as evidence of contemporary community standards, and 2) it must resolve a conflict among several courts as to whether this evidence is admissible. However, neither is a reason for granting review.

First, constitutional error did not occur in this case. A jury does not need extrinsic evidence to determine community standards. The whole point of the standard of the contemporary community is that a juror has his own understanding of the community in which he lives and his own knowledge of the propensities of the average person in his community, so that his determination is not dependent on expert advice or extrinsic evidence. *Hamling v. United States*, 418 U.S. 87, 104-105 (1974); *Smith v. United States*, 431 U.S. 291, 302 (1977).

Still, the Constitution does not forbid evidence relevant to the community standard. *Smith*, 431 U.S. at 302. Trial courts have wide discretion to admit or exclude evidence based on their assessment whether it may possibly assist the jury in its resolution. *Hamling*, 418 U.S. at 108. Thus, in *Smith*, no error occurred when the federal jury sitting in Iowa heard evidence that the State of Iowa did not regulate the distribution of obscene materials to adults.

The evidence was relevant because a state statute clearly reflects the mores of the community since the community's legislative body enacted the statute.

But municipal adult-use zoning ordinances are not relevant evidence of community mores as to obscene materials. These ordinances are adopted to geographically regulate activity within a municipality, including both obscene and non-obscene forms of sexually-related activity. Municipalities in Illinois do not adopt them as an acknowledgment that their citizens accept materials deemed obscene. Therefore, the Illinois courts have consistently ruled that adult-use ordinances are simply not relevant to the question of how an average person in the community would assess the question of obscenity. *People v. Sequoia Books*, 146 Ill.App.3d 1, 496 N.E.2d 740 (2nd Dist. 1986); *People v. Sequoia Books*, 150 Ill.App.3d 211, 501 N.E.2d 856 (2nd Dist. 1986); *People v. Sequoia Books*, 160 Ill.App.3d 750, 513 N.E.2d 1154 (2nd Dist. 1987).

This is not a case where Sequoia Books was prevented from presenting evidence of a community standard. Petitioner was allowed to present: 1) a public opinion poll to establish the attitudes that adults living across the State of Illinois have towards sexually explicit material; 2) testimony as to the various bookstores in communities throughout Illinois and the types of magazines they offered for sale; 3) expert testimony that the magazines did not appeal to prurient interest but, rather, appealed to the normal curiosity of the average adult about sex; and 4) expert testimony that the magazines would not lead the average adult to commit antisocial acts and that the magazines had value in that they provided a release and entertainment for a segment of the population. But certainly no constitutional error occurred by the denial of

admission of adult-use ordinances where Sequoia Books failed to establish their relevancy.

Nor is there a conflict on this issue. Sequoia Books incorrectly claims that such evidence would be admissible if presented by the defense in the Seventh Circuit and in the State of Ohio, citing *United States v. Various Articles of Merchandise*, 750 F.2d 596, 599 (7th Cir. 1984) and *State ex rel. Leis v. William S. Barton Company, Inc.*, 45 Ohio App.2d 249, 344 N.E.2d 342 (1975). These cases do not so hold.

In *Various Articles*, the Seventh Circuit reaffirmed that extrinsic evidence of a community standard is not required. But if extrinsic evidence is offered, then in order to be admitted, it "must address material clearly akin to the material in dispute." *Various Articles*, 750 F.2d at 599. Thus, the adult-use ordinances would clearly *not* be admissible in the Seventh Circuit, since they address material and concerns beyond that sold by petitioner in this case.

In *Leis*, the Ohio court found that it was error to deny a defendant's right to introduce evidence which directly related to the issue of obscenity. But adult-use ordinances relate to the issue of geographic regulation of sexually-related activity regardless of whether it is obscene. Since they do not directly relate to the issue of obscenity, they would clearly *not* be admissible in Ohio.

Therefore, there is no conflict between the Illinois opinion and *Various Articles* and *Leis*.

## CONCLUSION

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WHEREFORE, the People of the State of Illinois ask this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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